

longer exist. However, the history of the rise and fall of pay cable channels in some markets proves that there is a direct inverse relationship between the number of games appearing on off-air television and cable sports channels.

In Milwaukee, 60 games were broadcast on off-air television in 1983. In 1984, a cable channel was created and telecasted 67 games. The number of off-air broadcasts immediately dropped to 38. However, after 1984, baseball did not appear on a cable channel. As a result the number of games appearing on off-air television has increased to 65 games in 1993.

In Kansas City, the Royals experimented with cable in 1984 giving it the ability to telecast 50 games. However, the cable service failed. Since that time the number of games on off-air television has increased. In 1993, 63 Royals games will appear on free television.

The Mariners have never appeared on a cable sports channel. As a result the number of games appearing on off-air television has increased from 50 in 1984 to 60 in 1993.

The Cardinals began to experiment with a cable sports channel in 1984, permitting it to telecast 52 games. Forty games remained on off-air television. By 1989, 60 games were broadcast by KPLR TV and 50 games appeared on a pay cable service. Once the cable service folded, the number of games on KPLR immediately increased to 76 games in 1990.

Accordingly, the FCC cannot simply use examples like the Cardinals, Royals and Mariners to demonstrate that sports siphoning has not occurred. The reason that off-air games increased on these stations is because there is no cable sports channel to take them away.¹⁹ The markets are unique. For

¹⁹Importantly, cable sports channels need more than baseball to survive. It is difficult for a cable sports channel to survive unless it can acquire the rights to year round sporting events. In markets where they have acquired such rights, cable sports channels have aggressively taken sports off free television.

example, cable penetration in the market area for the Cardinals is relatively low. In fact the Cardinals have one of the largest off-air network in the country involving 23 television affiliates.

In those markets where cable channels exist, games are leaving off-air television. It is entirely possible that cable sports channels may develop in those few markets where none exist today. If this occurs, then games will migrate to those channels.

Perhaps the most telling example can be found with the new Colorado Rockies and Florida Marlins. The Rockies, which don't have a cable contract, will broadcast 80 games on KWGN this year. The Marlins, which have a cable contract, will broadcast 52 games of WBFS and 63 games cable's Sunshine Network.

C. National Hockey League

It is common knowledge that the National Hockey League has had trouble obtaining a national contract. Currently, there is no coverage by the three major broadcast networks, save for the All Star Game. Hockey remains a local sport.

There is every reason to believe the number of NHL games appearing on local television stations has declined in recent years. According to NAB's 1990 sports survey, the number of games appearing on off-air television declined 7.4 percent from

1986 to 1989.²⁰ During this same time period the number of games appearing on local and regional cable channels increased by 136 games, amounting to a 29.3 percent increase.²¹ Indeed, the number of hockey games leaving off-air television appears to be accelerating.

The Philadelphia Flyers provide a typical example. For the 1988/1989, 1989/1990 and 1990/1991 seasons, 43 Flyers games appeared on off-air television. Beginning with the 1991/1992 season, the number of games began to decline. During the 1991/1992 season, 32 games were broadcast. This year only 28 games appeared on off-air television. For the 1993/1994 season.

18,000 subscribers. Game three lured 20,000; game four 24,000; game five 26,000 and game six 32,000. The Stanley Cup games cost 12.95 per game. Overall the North Stars netted about \$500,000 for the first six games. This compares to only \$20,000 per game averaged on KSMP.

The economics of this situation crystalize the public policy debate. Potentially over a million viewers were denied access to Stanley Cup Playoffs and replaced by 32,000 hockey fans that could both afford and had technical access to the pay-per-view offerings.

From a pure economic standpoint, it made perfect sense for the North Stars management. However, from a public policy perspective, the result was appalling. The citizens of Minneapolis, who helped support the team with tax breaks for the stadium were left out in the cold. If this trend continues, there will be no hockey games on free television.

D. NBA

While the number of NBA games appearing on local television stations has increased in the aggregate, this growth is largely due to expansion.²² Importantly, games appearing on pay cable channels has increased rapidly, from 540 games in 1985/1986 to 750 games in 1989/1990. TNT will offer 50 games pursuant to a

²²NAB Sport on Television 1990 at 6.

contract with the NBA that will last through the 1993/1994 season.

At the same time local stations are losing games. For example, WPHL-TV, Channel 17 in Philadelphia, broadcast 42 Seventy-Sixer games in 1988, 1989 and 1990. Beginning with the 1991/1992 season the number of basketball games appearing on the

the cable industry. The court cited 1975 statistics showing that 9.8 million households, or 14 percent of all U.S. television households, had "access" to cable; that cable systems were predominantly small businesses, with 'the largest having only 101,000 customers and with only 224 of approximately 3,405 systems having more than 10,000 subscribers;" that most of these systems were outside the major television markets; and that "extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future."²³ Indeed, the court noted that the FCC in 1969 had found that it "had no information which would indicate that pay cable television could penetrate any television market to the extent needed to 'siphon' programming," but that it had nevertheless adopted the anti-siphoning rules only nine months later.²⁴ Today, in stark contrast, over 60 percent of U.S. households subscribe to cable. There are over 11,000 cable systems with 53 million basic subscribers and 37 million pay units.²⁵ It is a matter of

public record that many existing events, including college

jurisdiction over cable was limited to regulation "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," United States v. Midwest Video Corp., 406 U.S.

649, 667-68 (1972) (plurality opinion). Thus, the HBO court found

television -- not on cable but in movie theatres.²⁹ Finally, the court found that the Commission "has not documented its case that the poor would be deprived of adequate television service" in the absence of anti-siphoning regulation. Id. at 39. In short, the court found that the FCC had no basis or record evidence to support anti-siphoning rules in 1977. Again, given the factual record in 1993, it would seem that record evidence to support some form of regulation today is abundant.

The HBO court squarely held that the former anti-siphoning rules were content-neutral and not intended to curtail free expression, and thus were subject to the First Amendment test of United States v. O'Brien, 391 U.S. 367, 377 (1968). HBO at 48. However, the court found that the rules failed under O'Brien because it was not shown (1) that the rules furthered an important or substantial governmental interest, and (2) that the incidental restriction on First Amendment freedoms was no greater than essential to the furtherance of that interest. Id. 49-51. The court stated in this regard:

We have already concluded that the Commission has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a fanciful threat to those not served by cable. Instead, the Commission has indulged in speculation and innuendo. O'Brien requires that "an important or substantial governmental interest" be demonstrated, however -- a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency. The record before us fails on both scores.

²⁹Id. at 37.

Id. at 50. The court further found that the rule was overbroad because, among other things, it treated films, sports events, program series and even commercials together, without differentiating the rationales for regulation of these very different types of programming. Id. Again, the current record of sports event "siphoning" from free to cable television would seem to support a finding of an "important or substantial governmental interest" under O'Brien; and a narrowly tailored statutory provision specific to sports events cablecasts should satisfy the final prong of the O'Brien test.

In short, there is a strong factual, statutory and constitutional basis for enactment of a provision under the Communications Act that would limit the cablecasting of sports events that were recently telecast on free television stations.

IV. Conclusion

There can be no doubt that local college and professional sporting events are migrating away from over-the-air television. Moreover, there appears to be no legal impediment to reinstating some form of sports siphoning rules.

INTV does not believe that the enactment of retransmission consent will, by itself, cure the sports siphoning problem. Importantly, in each cable community there is only one monopsonist cable operator. This monopsonist will be negotiating with several stations that must compete against each other. With

this dynamic, cable has the ability to drive retransmission consent payments downward. Moreover, because many of the regional cable sports channels are owned by the large MSOs, there is a natural incentive to pass these costs on to subscribers, while at the same time seeking to limit any retransmission consent payments to local television stations.

Accordingly for the foreseeable future, local television stations will be forced to rely on advertising revenues to compete with pay cable services. These cable services will continue to enjoy two revenue streams. Moreover, cable operators will be able to spread the costs of sports programming over a number of channels by bundling various cable services together. This is especially true for ESPN which is usually an expanded basic offering.

The overriding public policy question is whether the FCC and the Congress are willing to bear the societal costs in permitting the continued migration of sports programming away from over-the-air television. INTV believes that the American tax payer, who bears the costs of funding universities and stadiums for professional sports, should not be required to pay twice for sporting events.

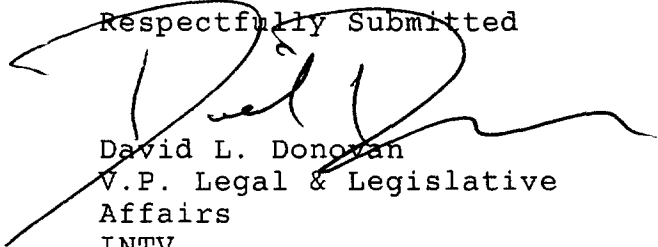
At the very least, the FCC should recommend to Congress that limits be placed on any further sports migration. Also, exclusive contracts with cable sports channels should be limited. It should be unlawful for cable operators to enter into arrangements with cable sports programmers that prevent the

broadcast of games, where the cable programmer does not intend to telecast those games. In this regard, cable programmers and ABC should be required to set their game selection well in advance of the telecast. Permitting these service to make last minute changes in schedules make it impossible for a station to market and promote games.

Similar restrictions should apply to any time block exclusivity arrangements between ESPN and Major League Baseball. ESPN should not have a monopoly on Wednesday night, or any other night.

INTV recognizes that drafting specific sports migration rules is a difficult task. Nevertheless, something must be done. Congress has given the FCC an tremendous opportunity to prevent the further migration of sports programming. We hope the Commission accepts the challenge.

Respectfully Submitted



David L. Donovan
V.P. Legal & Legislative
Affairs
INTV
1200 18th St. N.W.
Washington, D.C.
887-1970

March 29, 1993